IN THE

Supreme Court of the United States

October Term, 1950

No. 297

KIEFER-STEWART COMPANY, *Petitioner*,

v.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY AND CALVERT DISTILLERS CORPORATION, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT

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To the Honorable, The Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Kiefer-Stewart Company (hereinafter called Kiefer-Stewart), respectfully petitions that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this cause (R. 413), which reversed a judgment of the United States District Court for the Southern District of Indiana entered for petitioner (R. 360), and ordering dismissal of the action.

OPINION BELOW

The opinion of the Court of Appeals reversing the District Court (R. 399) is reported at 182 F. (2d) 228. The District Court judgment was entered after a jury verdict in favor of petitioner in the amount of $325,000, exclusive of attorneys' fees. (R. 357).

JURISDICTION

This is a treble damage proceeding brought under the antitrust laws of the United States (15 U.S.C. §§ 1, 15) by complaint filed September 13, 1947. (R. 2). The judgment of the District Court was entered on June 27, 1949. (R. 360). Respondents filed notice of appeal on July 22, 1949. (R. 361). The judgment of the Court of Appeals for the Seventh Circuit was entered on May 9, 1950. (R. 413). On May 24, 1950, petitioner filed a timely petition for rehearing (R. 414), which was denied on June 13, 1950. (R. 420). Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254, Subdivision 1.

STATEMENT OF THE CASE

The facts as they appear from the opinion of the circuit court disclose the following:

Seagram and Calvert are leading lines of blended whiskies on sale throughout the United States. The respondents Joseph E. Seagram & Sons, Inc. and Seagram-Distillers Corporation distill and distribute to wholesalers the Seagram line. Respondents Calvert Distilling Company and Calvert Distillers Corporation distill and distribute the Calvert line. All four companies are financially related in a way which in effect constitutes complete ownership and control by a common parent.

In the fall of 1946 the Seagram respondents adopted a policy of pegging the resale price for sales of their whiskey by wholesalers at the former O.P.A. level. Petitioner, which had been a leading wholesale distributor of the Seagram

line in Indiana, refused to fix its prices in accordance with the demand of the Seagram companies, whereupon the Seagram companies suspended all shipments to petitioner. Shortly thereafter, petitioner concluded an arrangement with the Calvert Companies to distribute their whiskies in Indiana, which involved no control by Calvert over petitioner's resale prices; and shipments of Calvert merchandise were guaranteed irrespective of the policy which had been enforced by Seagram. After the conclusion of this arrangement, conferences were held between officials of Seagram and Calvert "with reference to the delivery or non-delivery of Calvert products to Kiefer-Stewart Company." Calvert informed petitioner:

> "We are going along with Seagram on their sales policy. We are terribly sorry but we have to go along with Seagram," and, "[We] have to go along with the other side of the house."

For no other reason assigned the Calvert companies announced to petitioner that they were repudiating their commitment to petitioner to furnish Calvert merchandise and they revoked petitioner's Calvert distributorship.

From that time on, the Calvert and Seagram companies pursued identical resale price policies and, early in 1947, entered into fair trade contracts with all their Indiana wholesale distributors enforcing the same minimum resale prices.

After outlining the above facts in detail, the circuit court held that such facts did not furnish a scintilla of proof of conspiracy.

> "The most the proof shows," the court said, "is that Calvert for reasons of its own decided to abandon its policy and to follow that in practice by its competitor." [182 F. (2d) 228, 232; R. 406]

The circuit court refused to attach any weight whatever to Calvert's statement to the exact contrary (admitted in evi-

dence without objection from Seagram), on the ground that no Seagram representative was present when the admission was made, or authorized such admission. Dealing with the conferences admittedly held between Seagram and Calvert for the purpose of discussing deliveries to petitioner, the court observed:

> "The fact that they conferred proves nothing more than an opportunity to reach an understanding or to make an agreement. *An inference that they did so can be nothing more than a guess.*" [182 F. (2d) 228, 233; R. 407, emphasis supplied.]

As an alternative ground for reversal, the circuit court held in effect that the most that was shown by the evidence was a combination of manufacturers or suppliers to enter into a joint agreement to fix the margin of profit and the resale price for all the independent wholesalers who distributed their products, and that such a combination was lawful, provided that the result of such agreement was a temporarily lowered price to consumers.

A more detailed statement of facts as they appear in the record is as follows:

Petitioner, Kiefer-Stewart, is a wholesale drug concern. In 1946, before the acts complained of, it was the leading wholesale liquor distributor in the State of Indiana and one of the principal wholesale distributors of the Seagram line of whiskies in that state. (R. 34).

Joseph E. Seagram & Sons, Inc. (hereinafter referred to as Seagram) is the distiller of the Seagram line of whiskies. It owns all the stock of Calvert Distilling Company (hereinafter referred to as Calvert) and of Seagram-Distillers Corporation (hereinafter referred to as Seagram Sales). Calvert is the distiller of the Calvert line of whiskies. It distributes through its subsidiary Calvert Distillers Corporation (hereinafter referred to as Calvert Sales). Thus, all respondents are subject to the common control of Seagram. (R. 280-283). The four companies are the largest distillers and distributors of spirit blend whiskies both in Indiana and the United States. (R. 35).

In spite of this common control, Seagram and Calvert products have always been separately marketed under distinctive trade names. (R. 376, 390). No connection between Seagram and Calvert is disclosed in their advertising. (R. 386, 392). A principal officer of the companies testified that Seagram and Calvert are "really competitors." (R. 152).

During World War II and O.P.A. price regulation, liquor wholesalers in Indiana were held to a mark-up of 15% of cost, f.o.b. point of shipment, exclusive of new federal and state taxes which might be enacted during the war emergency (M.P.R. 445). During this period, a new Federal tax of $3.00 per proof gallon and an Indiana state tax of $1.00 per wine gallon were enacted. (R. 43, 284). These new taxes substantially reduced the percentage of gross profit to wholesalers. (R. 42, 284).

O.P.A. regulation of liquor prices terminated on October 23, 1946. (R. 284). Previously, petitioner had determined that upon the expiration of controls it would return to its historic pre-war practice and apply a percentage mark-up to its total costs, including the new federal and state taxes described above. (R. 42).[1] On November 1, 1946, Kiefer-Stewart made this change by filing with the Indiana Alcoholic Beverage Commission, a letter announcing this price revision. (R. 308).

Petitioner's attempt to establish its own prices and margin of profit independently was in conflict with the policy of the two Seagram companies whose policy was to fix the resale prices for its wholesale distributors. Seagram Sales

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[1] The effect of O.P.A. regulation on Indiana wholesalers was not only to reduce the former 17½% mark-up to 15%, but also, concurrently with the enactment of additional federal and state taxes, to require abandonment of the established practice of applying the mark-up to total costs. This method of pricing was cumbersome and entailed difficult accounting procedures. (R. 187-188). Following decontrol, petitioner simply undertook to restore the previous method of applying the percentage mark-up to total costs, including taxes, but continued the 15% mark-up rather than the 17½% generally in effect prior to O.P.A., and additionally absorbed freight on out-of-town deliveries. (R. 42-3).

determined to force its distributors to adhere to the former O.P.A. system of pricing. (R. 201-2, 204). To achieve this end Seagram Sales sent a telegram to all its distributor-customers throughout the country stating this policy, asking for the immediate assurance of full cooperation from each distributor—not only for himself but for his customers—and information as to the steps taken by each distributor to carry out the Seagram policy. (R. 393). Seagram's vice-president and sales head testified at trial (R. 204):

> "I issued instructions that anybody that raised the price of Seagram would not get any further shipments of Seagram's and if they did that, they would no longer be a Seagram distributor."

Petitioner refused to follow the Seagram dictation. On November 6, 1946, in order to enforce this price policy, Seagram Sales suspended all shipments to petitioner. (R. 285). Despite repeated requests by Kiefer-Stewart, shipments to it were never resumed, even though petitioner later capitulated and put into effect the prices demanded by Seagram. (R. 48, 53, 84).

The Calvert companies, prior to the acts and conspiracy complained of, had been keenly interested in obtaining the services of petitioner as a distributor in Indiana. Various overtures had been made to Kiefer-Stewart from 1942 to 1946. (R. 36, 79, 107). On October 21, 1946, before petitioner announced its determination to return to its pre-war system of pricing and before Seagram had suspended shipments, Calvert Sales offered petitioner a distributorship which Kiefer-Stewart accepted on November 5, 1946. (R. 108).

After Seagram Sales had suspended shipments to petitioner, officials of petitioner and the Calvert companies met on November 12; at Calvert's request, Kiefer-Stewart arranged a large meeting of petitioner's salesmen on November 23, 1946, to introduce the Calvert line. (R. 81).

During these negotiations in early November, 1946, Calvert was fully aware of petitioner's new price policy and Seagram's reaction to it. Calvert stated to petitioner that:

> ". . . regardless of what Seagrams did in Indiana that Calvert was going through with this order with Kiefer-Stewart . . ."
>
> "(Calvert) . . . wanted to get in the market in a big way . . . (and that this was) . . . a swell opportunity." (R. 81-82, 108).

After Seagram had suspended shipments, Kiefer-Stewart received, on November 12, 1946, assurances from the Calvert assistant general sales manager in New York that "the Seagram situation" was going to make no difference. (R. 82). Calvert's general sales manager similarly reassured petitioner (R. 39), and on November 16, 1946, Calvert filed a list of authorized wholesalers which included petitioner. (R. 298).

On November 19, 1946, the Calvert companies repudiated their agreements with Kiefer-Stewart, and notified petitioner that they would make none of the agreed shipments. (R. 40).

There is substantial additional evidence that the suspension of Seagram shipments and the refusal of Calvert to go through with its commitments to petitioner were the result of a combination and conspiracy in restraint of trade. In sworn answers to interrogatories both Calvert respondents admitted that conferences were held between principal officials of the Calvert and Seagram companies after November 6, 1946 (the date Seagram Sales suspended shipments) "with reference to the delivery or non-delivery of Calvert products to Kiefer-Stewart Company." (R. 379, 383), and Seagram Sales similarly admitted attending such conferences. (R. 392).

In notifying petitioner's president that Calvert Sales was not going through with its commitments, Calvert's sales head in Chicago stated that Calvert was:

"going along with Seagram on their sales policy. We are terribly sorry but we have to go along with Seagram." (R. 40).

Petitioner's president immediately telephoned Calvert's general sales manager who stated that Calvert would have to withdraw from the arrangement because it:

"... had to go along with the other side of the house." (R. 41).[2]

After the repudiation of the arrangements with petitioner the Seagram and Calvert companies pursued identical policies with respect to resale prices, ostensibly to reduce prices to consumers. However, in 1947 when supplies were more plentiful, they entered into fair trade contracts with all their Indiana wholesalers fixing identical *minimum* prices, thereby abandoning the pretense that their purpose was to lower prices to consumers. (R. 105, 285-9).

As a further matter, although Seagram claimed to be "holding the price line", it simply cheapened the quality of its product—thus receiving a price pegged by Seagram and Calvert together for less valuable liquor. This was done by adding a greater proportion of younger whiskies to the blend. (R. 211-12).

The District Court submitted the case to the jury on the issue whether the respondents had conspired to fix the resale prices for their products. (R. 267, 71). The jury found for plaintiff, assessing damages at $325,000. (R. 357). The court entered judgment trebling the damages and allowing $50,000 attorneys' fees, making a total judgment of $1,025,000.00. (R. 360-1).

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[2] The Seagram companies occupy space on the south side of the Chrysler Building in New York City; Calvert has space on the north side of the same floors. (R. 41).

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The decision of the Seventh Circuit reversed the judgment of the District Court and remanded the cause with directions that the judgment be vacated and the cause of action be dismissed at petitioner's cost [182 F. (2d) 228, 236; R. 412].

This was based on two grounds:

1. That the evidence was not sufficient to support a finding by the jury that a combination or conspiracy existed.

2. That assuming the combination and conspiracy proved, such a conspiracy was only one to depress or to prevent an increase of prices, and, as such, was not a violation of the antitrust laws.

The standards of proof adopted by the court below would render it practically impossible to establish a case of conspiracy in restraint of trade, unless a plaintiff should be fortunate enough to discover written agreements between the conspirators detailing their unlawful activities.

The opinion went far towards repudiating the doctrine of this Court as established in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, condemning as unlawful *per se*, agreements to "raise or lower prices".

QUESTIONS PRESENTED.

1. Whether it is lawful under the antitrust laws for competing manufacturers and distributors in interstate commerce to combine and control the margins of wholesale profit by enforcing maximum or ceiling prices to which all the wholesalers of their products must conform.

2. Whether an appellate court should be permitted to reject the verdict of a jury finding the existence of a combination or conspiracy in violation of the antitrust laws based upon such facts as identical action taken by two competing sellers under common control in fixing and coercing absolute or even maximum resale prices

together with sworn statements on the part of such competitors that conferences between them were held concerning such concert of action and admissions by one of them that the identical action was taken due to pressure exerted by the other members of the conspiracy.

SPECIFICATION OF ERRORS.

1. The Court below erred in holding that a conspiracy between competing sellers under common control to fix maximum resale prices is not a violation of the antitrust law.

2. The Court below erred in setting aside a jury verdict finding a conspiracy in restraint of trade.

3. The Court below erred in setting aside a finding, implicit in the jury verdict, of conspiracy to fix absolute resale prices.

4. The Court below erred in refusing to give any weight to statements of a co-conspirator admitted without objection or limitation.

REASONS FOR GRANTING THE WRIT.

1. A question of far-reaching importance is presented by the circuit court's ruling that a combination to fix and coerce resale prices at temporarily lower levels than would result from a competitive market is not in violation of the antitrust laws. This is a novel doctrine. It is based upon the notion that a combination of suppliers to fix prices, which combination the court believes to be of temporary advantage to consumers, is not a restraint of trade no matter how much merchants dealing with the combination are damaged or the extent to which their previous margins are squeezed. This doctrine would substitute the judgment of a court as to the consumers' interest, for the free market place; it would leave out of account the interests of independent merchants and would give to large combinations the powers of a private Office of Price Administration without any responsibility to the public.

This novel principle announced by the court, if permitted to stand, would open a Pandora's box of new problems in the administration of the antitrust laws. In effect the circuit court has said that a combination of manufacturers can meet and determine what margin of profit the independent businesses who market their products shall have. If the combination is large enough to control an advertised product which the distributor must have to maintain his reputation and good will, the court's decision gives unlimited opportunities to the members of that combination to exploit both wholesalers and retailers. It may compel them to sell at no margin of profit, or even at a loss.

Control of prices is a delicate and dangerous undertaking. The economic effects may well be disastrous unless both the price to the consumer and the margin of profit to the distributor are considered and carefully weighed. Both of these factors are always considered under governmental systems of price control set up in emergency periods. In the absence of price controls the courts are certainly not delegated the power to pass upon the economic benefits of a private combination which regulates the margin of profit of the independent businessmen who distribute its goods.

To delegate to a combination of private companies the power to fix prices was held unconstitutional even where the prices were investigated and approved by a government agency in *Schechter Poultry Corp.* v. *U.S.*, 295 U. S. 495. It is true that during the N. R. A. period it was thought of economic benefit to raise prices and increase margins of profit. Here the court appears to think it is of economic benefit to lower margins of profit. The decision of such problems cannot be constitutionally delegated to private groups on the assumption that their motives will be laudable and that they will act in the public rather than their own private interest.

The record in this case destroys the circuit court's illusion that consumers actually benefit by private price-fixing combinations that claim to act in their interest. It shows that the so-called "maximum" price set by respondents

became in July 1947 the "minimum price", pursuant to fair trade contracts simultaneously executed by all respondents with their Indiana distributors. This affords proof not only that the respondents fixed the absolute price for their goods by concerted action, but illustrates the ease by which a temporarily lowered price, fixed by agreement, can quickly or gradually become a higher price than competition would create. It shows how such a price-fixing combination can be utilized to obtain effective control of the business of its formerly independent distributors. Certainly a federal court has neither the machinery nor the omniscience to decide all of the problems implicit in the application of the principle that combinations to lower prices are not in violation of the antitrust laws.

The confusion which this novel interpretation puts upon principles firmly established by the Supreme Court is illustrated by the following comment in the United States Law Week (18 L.W. 1181, May 30, 1950):

> "An important limitation may be placed upon the definition of illegal price-fixing agreements set forth in the Supreme Court's decision in the Socony-Vacuum case, 310 U. S. 150, if a ruling of the Court of Appeals for the Seventh Circuit is upheld. The court holds that an agreement among manufacturers to fix a maximum markup percentage for use by wholesalers purchasing their products for resale is neither in restraint of trade nor an impairment of competition . . . Pointing out that price-fixing combinations violate the Sherman Act because they tend to eliminate competition, the court decides that maximum price limitations are legal . . ."

2. Should the techniques of appellate review adopted by the court below be sanctioned, it would be virtually impossible for a plaintiff to prove a conspiracy in violation of the antitrust laws. Corporations which have had experience with the antitrust laws have learned to leave few, if any, tracks. The court below requires that gentlemen of the conspiratorial trade should be surprised with their pointed

caps together.[3] This should not be and has not been the law, until the decision below. To reject compelling or even telling inferences of conspiracy and further to expand the hearsay rule beyond any previously sanctioned limit, not only involves a marked departure from the historic function of a reviewing court, but would constitute a judicial repeal of the antitrust laws.

BRIEF IN SUPPORT OF PETITION.

I. The Doctrine that Any Combination or Conspiracy Between Competitors to Raise, Depress, Fix, Peg, or Stabilize Prices in Interstate Commerce is Unlawful, is a Salutary Doctrine and Should Not Be Limited.

To permit manufacturers or other sellers in interstate commerce, by agreement and by combination, to fix and coerce maximum price levels would open the door anew, as respects price agreements, to controversy over the question whether the tampering by competitors with price structures is reasonable or unreasonable, a question which has been deemed irrelevant since *United States* v. *Trenton Potteries Co.*, 273 U. S. 392.

In *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, it was pointed out (p. 218) that for over forty (now fifty) years this Court has consistently and without deviation adhered to the principle that "price agreements are unlawful per se," (not necessarily because of their immediate adverse effect but because of their "actual or potential threat to the central nervous system of the economy," note, p. 224). The Court said, in reversing the Seventh Circuit:

> ". . . An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used . . . a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." (at 222, 223)

[3] *Goldman Theatres, Inc.* v. *Loew's Inc., et al.*, 150 F. (2d) 738, 743 (3rd Cir. 1945).

This blanket prescription of price-fixing agreements is grounded particularly on a recognition of the fact that those "who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since these prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions." (p. 221.) It is but a corollary that maximum prices fixed today may become minimum prices tomorrow; *and in the case at bar they did become so* when the respondents shortly after the successful coercion of downward revision of resale prices to the abandoned O.P.A. level, prescribed the identical resale prices as the *minimum* resale prices for their goods. (R. 104-105.)

For still another reason, the crippling constriction by the Court of Appeals of the principles announced by this Court in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, constitutes a damaging limitation of Section 1 of the Sherman Act. Such construction is applied by the Court of Appeals to the fixing of resale prices rather than to the fixing of prices to be obtained by the conspirators themselves. Resale price agreements between sellers involve not only agreement upon prices but, of necessity, agreement upon the means to persuade or, as here, to force adoption of the agreed price by the separate customers of each.

Therefore, wholly apart from the question whether the language of this Court in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, admits of valid agreements under the Sherman Act between sellers fixing ceilings for their *own* prices, the Court of Appeals departed from the rationale of the resale price cases *in holding that competing sellers legally may combine to refuse to sell their goods to a customer of either or both* because he will not submit to their combined dictation of what *his* resale prices should be (whether maximum or minimum). Such a price-fixing combination, as here, of necessity restrains the "freedom of trade on the part of dealers who own what they sell" (*Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 407-408). This agreement on price and means of coercion was clearly

"designed to take away dealers' control of their own affairs" (*United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85, 100) and was but the prelude to absolute control of price by illegal use of Fair Trade contracts. The resale price cases expressly ban such restraints which are but concrete illustrations of the natural consequences which caused this Court in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, to proscribe as illegal *per se* any tampering with price structures.

The basis for the court's belief that conspiracy to fix prices is not a violation of the antitrust laws so long as it lowers them is found in the following naive economic dictum:

> "Bona fide competition results in benefit to the consumer in the form of lower prices. Higher prices are a detriment to the consumer and are no aid to the competitive system. . . Trade, like competition, is impaired by high prices and the ability to increase prices."

This is like saying that the opportunity to make profits is no aid to the competitive system; that prosperity of independent businessmen and merchants who depend upon large centralized suppliers is not one of the basic necessities in creating effective purchasing power; that a system of absentee control of businesses in smaller communities by a centralized combination with power to regulate how much money these independent businesses can make is to the benefit of our economy. If the court's economic dictum were true we should enact a perpetual O.P.A. because certainly private agencies cannot be delegated the power to control competition. As Chief Justice Hughes said in the *Schechter case:*

> "The government urges that the codes will 'consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems.' Instances are cited in which Congress has availed itself of such assistance; as, e.g., in the exercise of its authority over the public domain, with re-

spect to the recognition of local customs or rules of miners as to mining claims, or, in matters of a more or less technical nature, as in designating the standard height of drawbars. But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." (Schechter Poultry Corp. v. U. S., 295 U. S. 495, 537).

II. The Standards Established by the Court Below for Proof of Conspiracy in Restraint of Trade Are so Absolute as to Render Proof Impossible in the Ordinary Case.

The court below correctly stated the law in saying that, after the jury verdict, the record

> "must be considered in a light most favorable to the plaintiff." [182 F. (2d) 228, 230; R. 402]

In considering the record, however, it found "not a scintilla of proof" that a conspiracy or combination among respondents existed. [182 F. (2d) 228, 232; R. 406]

It is difficult to imagine a case involving the modern business community where the proof could be more conclusive. The record shows, in brief:

1. That the Seagram and Calvert companies were financially related and controlled by a single parent;
2. That Seagram determined to fix resale prices at the previous O.P.A. levels and punished Kiefer-Stewart for refusing to adhere to its policy by suspending shipments to petitioner;

3. That Calvert, admittedly a Seagram competitor, and aware of the Seagram policy, determined to expand its distribution in Indiana through Kiefer-Stewart without any control over resale prices;

4. That conferences between officials of the two Calvert companies and Seagram Sales were held and that the question of supplying product to Kiefer-Stewart was discussed;

5. That Calvert reversed its position towards Kiefer-Stewart and refused shipments unless Kiefer-Stewart would adhere to the identical resale price policy demanded by Seagram;

6. That Calvert told Kiefer-Stewart that the reason for its withdrawal from the arrangement was that it "had to go along with Seagrams . . . the other side of the house . . . on their sales policy.";

7. That thereafter Seagram and Calvert adopted and maintained an identical price-fixing policy, including fair trade contracts at identical prices.

The only logical inference—and the one found by the jury—is that at the conferences admitted and sworn to by respondents, it was agreed between Seagram and Calvert to fix resale prices at the previous O.P.A. level.

If evidence of this character is as a matter of law not sufficient to prove a conspiracy in restraint of trade then the former legal standards for proof of a violation of the Sherman Act have been reversed and abandoned.

Certainly this unchallenged evidence established an over-all pattern of the combination or conspiracy which the jury found to exist. Far less substantial proof has frequently been deemed sufficient to establish violations of antitrust laws, since the courts have long recognized that the circumstances of conduct in this field should be considered and weighed in their entirety. This concept is well established, not as a rule of evidence, but as an indispensable instrumen-

tality in giving force and effect to the antitrust laws. These standards have been expressed in:

American Tobacco Co. v. *United States*, 328 U. S. 781

United States v. *New York Great A. and P. Tea Co.*, 173 F. (2d) 79 (7th Cir., 1949).

As stated in the *A. and P. case* at 81, the rule is:

"It needs the citation of no authority to support the proposition that if there is any substantial evidence to support the court's finding, it must be sustained. . . . We consider the case here as a whole and not piecemeal. If viewing the evidence as a whole there emerges an overall pattern of guilt as charged, the finding must be sustained."

Part of the over-all pattern of guilt, as shown by the evidence in this case, was the statement of Calvert to the petitioner that it acted in combination with Seagram to enforce adherence to the O. P. A. pricing method. To this evidence the court refused to give any weight. No rule of evidence was involved because Calvert's statement had been received without objection from either Calvert or Seagram. Under these circumstances, even if hearsay, such statements must be considered as evidence.[4] Undoubtedly the reason for failure to object was recognition of the fact that Calvert's statement was unquestionably admissible under the co-conspirator's rule.[5] The circuit court, however, refused

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[4] *Diaz* v. *United States*, 223 U. S. 442, 450; *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 205 U. S. 1, 9.

[5] *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U. S. 161; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *National Ben Franklin Fire Ins. Co.* v. *Stuckey*, 79 F. (2d) 631 (5th Cir., 1935); *United States* v. *Vehicular Parking*, 52 F. Supp. 751 (D. Del., 1943).

In the *Hitchman* case, it was said:

"In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves." (at 245)

to accord any probative value to the Calvert statements concerning its reasons for reversing its price policy in combination with Seagram.

It also refused to accord any weight to the previous action of Seagram, the admitted conferences between Seagram and Calvert, the subsequent reversal of Calvert's policy in order to conform to Seagram's and the final adoption of identical price policies by the two. The ruling of the circuit court, in this respect, ignored the well established rule in antitrust cases that direct testimony of the conspirators is not essential to prove a conspiracy in restraint of trade. Conspiracy may be inferred from things done showing a uniform course of conduct. Proof of a formal agreement is not required.[6]

The *Interstate Circuit* case illustrates this principle. Two circuit exhibitors of motion pictures in Texas demanded that the various distributors include certain price-fixing and other restrictions in licenses issued to all exhibitors in the Texas area. No conferences between the distributors themselves or between the distributors and the two circuits were proved. There were no admissions of conspiracy.

> "The trial court drew the inference of agreement from the nature of the proposals made on behalf of Interstate and Consolidated; from the manner in which they were made; from the substantial unanimity of action taken upon them by the distributors . . ." 306 U. S. 208, 221.

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[6] *Lawlor* v. *Loewe*, 209 Fed. 721 (2nd Cir., 1913), aff'd 235 U. S. 522; *Eastern States Retail Lumber Dealers' Ass'n.* v. *United States*, 234 U. S. 600; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85; *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U. S. 208; *Interstate Circuit* v. *U. S.*, 306 U. S. 208; *American Tobacco Co.* v. *United States*, 328 U. S. 781; *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), aff'd 321 U. S. 707; *F. T. C.* v. *Beechnut Packing Co.*, 257 U. S. 441; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *United States* v. *Griffith, et al.*, 334 U. S. 100; *United States* v. *Schine Chain Theatres, Inc.*, 63 F. Supp. 229 (W. D. N. Y. 1945); *Hoffman* v. *Riverside and Dan River Cotton Mills, Inc.*, 55 F. Supp. 13 (S. D. N. Y. 1944).

The Supreme Court said:

"As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other . . . In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators . . ."

"We think this inference of the trial court was rightly drawn from the evidence." (306 U. S. 208, 221)

Similarly, in the *American Tobacco* case, which was a criminal suit requiring more exacting proof, the government had not a single document or other direct evidence that the major tobacco companies had conspired to depress the price of leaf tobacco, to maintain a fixed factory or wholesale price, or otherwise collectively to restrain trade. All of the courts involved, the district court, circuit court, and the Supreme Court, inferred conspiracy from uniformity of conduct.

The Supreme Court held, 328 U. S. 781, 809, 810:

"No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words."

But, in the case at bar, the record contains not only circumstantial evidence comparable to that adduced and found sufficient in the *Interstate* and *American Tobacco* cases; but in addition, the direct evidence of Calvert's two officers that its identical action was taken because it "had to go along with Seagram", and also proof (lacking in the *Interstate* and *American Tobacco* cases) that the parties conferred with respect to the very matter upon which the conspiracy charge was based. With such proof, direct evidence of the conspiracy is available. Rare is the case where as much proof exists.

It is respectfully submitted that the rejection of the verdict of a jury finding a violation of the antitrust laws upon a record such as that presented in this case presents a dangerous precedent. To permit this decision to stand as the controlling authority in the Seventh Circuit would make it practically impossible to sustain an antitrust action in that area and would in addition create conflict and confusion by its use as a precedent in the other circuits.

CONCLUSION.

Petitioner respectfully urges the Court to issue the writ of certiorari prayed for because the decision below presents two important questions which should be reviewed, namely:

1. The limitation imposed by the court below on the doctrine that a conspiracy to fix prices is unlawful *per se*, and

2. The unwarranted standard of proof required in an antitrust action by the court below which does violence to the proper enforcement of the antitrust laws.

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